86-6139

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK & TRUST,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the racially adverse impact of an employer's practice or simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of Griggs vs. Duke Power Co., 401 U.S. 424 (1971)?

2. Does the mathematically necessary use of different statistics to measure the varying results of an employer's racial bias preclude certification of one class of all victims of the bias?

3. Is joinder practicable among the past, present and future employees of an employer, of whom fifteen are past or present employees, and several of whom are unaware of their injuries?

4. Once having stricken an underpinning of a district court's Title VII Judgment, ought a Court of Appeals return the case to the district court to let the lower court, rather than the appellate court, in the first instance reconsider its judgment?

5. Is a district court's acceptance, in a Title VII case, of an employer's mutually contradictory explanations over a sequence of employment decisions, clearly erroneous?

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CLARA WATSON,

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Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's August 27, 1986 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinions of the United States Court of Appeals for the Fifth Circuit from which review is sought, are reported at 796 F.2d 791 (5th Cir. 1986), and are attached as Appendix A to this Petition.

The Order of the Court of Appeals denying Petitioner's Suggestion For Rehearing En Banc, is reported at 796 F.2d 791 (5th Cir. 1986), and is attached as Appendix B to this Petition.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas from which Petitioner appealed, are not reported, but are attached as Appendix C to this Petition.

The Memorandum Opinion and Order of the District Court certifying Petitioner's original class, is not reported, but is attached as Appendix D to this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is now sought, August 27, 1986. A timely Suggestion For Rehearing En Banc, the Court denied September 30, 1986. Jurisdiction is now conferred upon this Court by 28 U.S.C. sec. 1254(1).

STATUTES AND RULES INVOLVED

Sec. 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq., provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Rule of Civil Procedure 23, provides in relevant part:

> (a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition.
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

STATEMENT OF THE CASE

The summer of 1973, Fort Worth Bank and Trust hired Clara Watson, Petitioner, a black, to the job of proof operator, and put her in a back room, not visible to the bank's customers. She joined only four other black employees: the porter, the kitchen attendant, and two others who printed checks in the basement.

Years passed and Clara Watson approached the bank's senior vice-president for personnel, Gary Snipp, with her interest in becoming a teller. Mr. Snipp put her off: a teller, after all, had to handle too much money "for blacks."

After seven years, Clara Watson sought appointment to four supervisory vacancies in succession. When Clara Watson's years of banking experience outdistanced her white competitor's, the bank ignored it. When her white competitor's experience outdistanced her own, the bank focused upon it. Each of the four supervisory vacancies was given to a less senior white - the last, to a young white man with a few months' experience.

Even the summer of her trial, after eleven years, Fort Worth Bank and Trust had no black officers or even supervisors. The supervisors, in whom the bank reposed unbridled authority to make employment decisions, hired - by the bank's own proof - 26% of available non-blacks and only 0% of available blacks; placed whites at least one pay grade above comparably qualified blacks; and paid whites some $46.00 per month more than even those blacks in the same pay grade.

Fort Worth Bank and Trust never even offered an explanation

for these statistics.

October 21, 1981, Clara Watson instituted this suit under 42 U.S.C. 1981 and 2000e et seq. and 28 U.S.C. 1343 and 2201 in the United States District Court for the Northern District of Texas, Fort Worth Division. March 4, 1983, and in the light of Gen. Tel. Co. of Southwest vs. Falcon, 457 U.S. 147 (1982), the Honorable Eldon B. Mahon certified one Plaintiff class of all past, present and future black applicants to and employees of Fort Worth Bank & Trust since October 21, 1979.

But by the time of trial, July 9, 1984, and apparently in the light of Falcon, Fort Worth Bank & Trust's senior vice-president for personnel recanted his earlier testimony and disclaimed his personal involvement in most of his bank's personnel decisions. The district court credited his recantation and November 20, 1984, convinced the recantation purged the Plaintiff class of its requisite commonality, split the class of black applicants and employees in two, found joinder among the latter practicable and decertified it, and tested the few surviving, individual claims of Clara Watson only on the rigorous disparate treatment theory. The stark inconsistencies of the bank's rationalizations in rebuttal notwithstanding, the court generally credited the rebuttal - even though the bank's shifting rationalizations could not have dispelled the discriminatory implications of the fourth promotion, had the court not considered sua sponte Clara Watson's then absence from the bank. The district court found no discrimination proven.

August 27, 1986, a divided panel of the United States Court of Appeals for the Fifth Circuit held the disparate impact theory unavailable to challenges to the practices at bar, parted with the lower court to hold the requisite typicality of a class action extinguished by the mere use of different statistics to measure the varied results of an employer's racial bias, but concurred upon the practicability of employee joinder, parted again with the lower court to hold its consideration of a justification never urged by the employer legally objectionable, but searched for and found an ample rebuttal of the inferences of discrimination among the employer's own inconsistent justifications.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE RACIALLY ADVERSE IMPACT OF AN EMPLOYER'S PRACTICE OF COMMITTING EMPLOYMENT DECISIONS TO THE UNCHECKED DISCRETION OF A WHITE SUPERVISORY CORPS CANNOT BE TESTED UNDER GRIGGS VS. DUKE POWER CO., 401 U.S. 424 (1971), IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, THE SIXTH, THE SEVENTH, THE TENTH, THE ELEVENTH, AND THE DISTRICT OF COLUMBIA CIRCUITS.

To the summer of Petitioner Clara Watson's trial, the Respondent Fort Worth Bank & Trust had never employed a black director, a black officer, or a black supervisor - a self-perpetuating result of the bank's delegation of authority for hirings and promotions to the unregulated discretion of its always white officers and white supervisors. This delegation was Fort Worth Bank & Trust's routine, if subjective, procedure for testing the qualifications of its applicants and employees - a procedure, because routine, and unlike the quite individualized decision at issue in McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973), subject to the strictures upon classificatory tendencies of sec. 703(a)(2) of Title VII and Griggs vs. Duke Power Co., 401 U.S. 424 (1971). See Hawkins vs. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Rowe vs. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88, 93 (6th Cir. 1982). Only Griggs' examination of the results of, rather than McDonnell Douglas' hunt for the motivations harbored in, the bank's procedures, could root out of the subjective procedures elements of the routine that systematically disadvantaged blacks while making no compensating contribution to the business of the bank. See Segar vs. Smith, 738 F.2d 1249, 1288 (D.C. Cir. 1984).

The district court, however, limited its inquiry to a McDonnell Douglas hunt for particularized discriminatory feelings against Clara Watson - and in conflict with 29 C.F.R. sec. 1607.16(q), the pertinent guideline promulgated by the federal agencies enforcing Title VII, and in conflict with the law of several other circuits, see e.g. Shidaker vs. Carlin, 782 F.2d 746 (7th Cir. 1986); Griffin vs. Carlin, 755 F.2d 1516 (11th Cir. 1985); Hawkins vs. Bounds, 752 F.2d 500 (10th Cir. 1985); Segar vs. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Rowe vs. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Grant vs. Bethlehem Steel Corp., 635 F.2d 1007 (2nd Cir. 1980), the Court of Appeals below held that the district court could not have broadened its inquiry, that Griggs has no application to routine procedures involving even unnecessary elements of discretion.

II. THE FIFTH CIRCUIT'S HOLDING THAT THE MATHEMATICALLY NECESSARY USE OF DIFFERENT STATISTICS TO MEASURE THE VARYING RESULTS OF AN EMPLOYER'S RACIAL BIAS PRECLUDES CERTIFICATION OF ONE CLASS OF ALL VICTIMS OF THE BIAS, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE FOURTH, THE EIGHTH, AND THE DISTRICT OF COLUMBIA CIRCUITS, AND DRAINS THE MEANING FROM THIS COURT'S DECISION IN GEN. TEL. CO. OF SOUTHWEST VS. FALCON, 457 U.S. 147 (1982).

At her class certification hearing and at her trial, Petitioner Clara Watson adduced proof not only of her own promotional opportunities, at Respondent Fort Worth Bank & Trust, lost to less deserving whites, but also of the bank's routine delegation of authority for all personnel decisions to the unregulated discretion of its departmental supervisors, a routine

delegation of which her lost promotions were one result, of which the sluggish advancement of other black employees was a second result, and of which the almost imperceptible trickle of black applicants hired into the bank was a third result. This was the very proof, tying employees to applicants, upon which Gen. Tel. Co. of Southwest vs. Falcon, 457 U.S. 147, 158 (1982) insisted.

Hence, the district court at first permitted Petitioner to represent the class of all black victims, employees and applicants, of Respondent's single decisionmaking process; but when Respondent's senior vice-president for personnel recanted earlier testimony, and forswore personal involvement in all personnel decisions, the court misread Falcon to preclude class certification where all decisions are not traceable to one individual, and decertified Petitioner's class. This one changed fact, this one misreading of Falcon, triggered the district court's change of heart - plainly an abuse of discretion. Cf. Bazemore vs. Friday, _____ U.S. _____, _____ S.Ct. _____, 92 L.Ed.2d 315, 334 (1986).

The Court of Appeals avoided this, alighting instead upon a distinct ground for decertification present from the outset, and therefore a ground with which the district court must not have agreed. Petitioner had adduced proof of an utterly subjective decisionmaking process, at Fort Worth Bank & Trust, that could infect promotions and hirings with racial preferences; distinct proof of racial disparities in promotions, thus impugning the motivations of white supervisors who also decided upon hirings;

and distinct proof or consequently not surprising racial disparities in hiring. In conflict with the law of other circuits, see e.g. Holsey vs. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984); Paxton vs. Union National Bank, 688 F.2d 552, 562 (8th Cir. 1982); McKenzie vs. Sawyer, 684 F.2d 62, 74 (D.C. Cir. 1982), the Court of Appeals insists that employee and applicant injuries will never be typical, within the meaning of Federal Rule of Civil Procedure 23(a)(3), unless the proof of disparities in promotion and the proof of disparities in hiring can be collapsed into one statistic, a mathematical impossibility that would drain Falcon's excepting footnote 15 of all meaning.

III. THE FIFTH CIRCUIT'S HOLDING THAT JOINDER IS PRACTICABLE AMONG THE PAST, PRESENT AND FUTURE EMPLOYEES OF AN EMPLOYER, OF WHOM FIFTEEN ARE PAST OR PRESENT EMPLOYEES, AND SEVERAL OF WHOM ARE UNAWARE OF THEIR INJURIES, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SIXTH, THE EIGHTH, AND THE TENTH CIRCUITS.

Perhaps because Respondent Fort Worth Bank & Trust had hired so few of its black applicants, see Cross vs. National Trust Life Insurance Co., 553 F.2d 1026, 1030 (6th Cir. 1977), few black persons, fifteen, were privileged to be among the employees who suffered under the bank's racial preferences. Subtracting from this number three black women who testified to no awareness of such preferences, the district court found joinder of the remainder practicable and refused certification of a Federal Rule of Civil Procedure 23(b)(2) employee class.

Though the impracticability of joinder is not belied, but attested to by employees' ignorance of discrimination against

them, see Paxton vs. Union National Bank, 688 F.2d 552, 560 (8th Cir. 1982), by the difficult position of any employee, naturally reluctant to join in haling her employer into court, see Horn vs. Associated Wholesale Grocers, Inc., 555 F.2d 270, 275 (10th Cir. 1977), and by the legal impossibility of any collection of employees, independently joined, securing the complete, broad-based injunctive relief for themselves, their colleagues and future employees that may be gotten in a Rule 23(b)(2) class action, see Paxton, 688 F.2d at 561; Horn, 555 F.2d at 275; Cross, 553 F.2d at 1030, the Court of Appeals, in conflict with these circuits, left the decision of the district court undisturbed.

IV. THE FIFTH CIRCUIT'S PROCEEDING, AFTER HAVING STRICKEN AN UNDERPINNING OF THE DISTRICT COURT'S TITLE VII JUDGMENT, TO ATTEMPT TO AFFIRM THE JUDGMENT ON OTHER GROUNDS, RATHER THAN RETURNING THE CASE, ABSENT THE OBJECTIONABLE UNDERPINNING, TO THE TRIAL COURT FOR ITS OWN RECONSIDERATION, CONFLICTS WITH THE DECISION OF THIS COURT IN LEHMAN VS. TROUT, 465 U.S. 1056 (1984).

On four occasions, Petitioner Clara Watson sought out promotions to Respondent Fort Worth Bank & Trust's white supervisory ranks. On the fourth and last occasion, after seven years with the bank, she lost out to a young white at the bank only a few months. This was, uneasily, explained by the district court partly on the basis of Petitioner's absence from the bank on a medical leave at the moment of her rejection, but the bank never advanced that explanation. The Court of Appeals therefore disregarded it, and nevertheless proceeded to find support for the

district court's judgment in other explanations the bank had advanced.

After having stricken one of the underpinnings of the district court's judgment, the Court of Appeals in Lehman vs. Trout, 465 U.S. 1056 (1984) was instructed not to attempt to find support for the judgment elsewhere in the record, but rather to remand to the district court for its own plenary reconsideration of the judgment. The present case is no different.

V. THE FIFTH CIRCUIT'S HOLDING THAT ACCEPTANCE BY THE DISTRICT COURT OF THE EMPLOYER'S MUTUALLY CONTRADICTORY EXPLANATIONS OVER A SEQUENCE OF EMPLOYMENT DECISIONS WAS NOT CLEARLY ERRONEOUS, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, THE EIGHTH, AND THE ELEVENTH CIRCUITS.

Petitioner's experience in banking was not always ignored. It was on two occasions, when Petitioner's experience surpassed her competitor's. But on the two other occasions, when her experience fell short of her white competitor's, it became the focal point of the promotion decision.

Though Anderson vs. Bessemer City, _____ U.S. _____, _____ S.Ct. _____, 64 L.Ed.2d 518, 529 (1985) left the Courts of Appeals free to discredit such obvious inconsistencies, and though other circuits have held strikingly similar "ad hoc, contradictory and conflicting explanations" legally insufficient to rebut inferences of individual discrimination, Paxton vs. Union National Bank, 688 F.2d 552, 566 (8th Cir. 1982); see also, e.g., Walker vs. Jefferson County Home, 726 F.2d 1554, 1559 (11th

Cir. 1984); Grant vs. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2nd Cir. 1980), the Court of Appeals below left the district court's acceptance of this inconsistency undisturbed.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the August 27, 1986 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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